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In The

Supreme Court of the United States

October Term, 1994

CURTIS LEE KYLES,

Petitioner,

versus

JOHN P. WHITLEY,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I. THE STATE FAILS TO REFUTE PETITIONER'S DEMONSTRATION THAT HIS CONVICTION WAS BASED ON INCOMPLETE, FALSE, AND DISTORTED EVIDENCE

In the face of Petitioner's well-founded claims of prosecutorial misconduct and failure to disclose relevant favorable and exculpatory evidence, the state's brief seeks to focus exclusively on the guilty verdict at trial. In so doing the state fails to address Kyles's central complaint, that the facts presented at trial were incomplete, distorted, or false, and the state knew it. For example, the state's brief reiterates the eyewitness testimony without responding to Kyles's concerns about the effect of prosecutorial misconduct on the strength and correctness of that testimony, and without even acknowledging, except in a footnote, that one of the eyewitnesses subsequently stated that her testimony was entirely the product of improper state pressure.[1]

It was the prosecution's constitutional obligation to intervene when false testimony was presented to the jury; it failed to do so. Instead the state permitted testimony to go uncorrected that it knew to be false. For example, as was thoroughly discussed in Petitioner's Brief, the state knew that Beanie changed the plate on Dye's car and that Beanie was at Kyles's apartment Sunday, yet it allowed the fact finders to believe those points were in dispute. The state allowed the testimony of Isaac Smallwood to go

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[1] Petitioner's Brief at 3, n.3 & 4.

uncorrected, knowing that he had never previously stated he witnessed the events he described under oath.

A. The State Does Not Even Attempt To Address The False Evidence Claim

There are only two sentences in the state's brief which appear to address the claims that Kyles has grounded in *Napue v. Illinois*, 360 U.S. 264 (1959). The state's assertion that Kyles's claims of "misconduct largely involve issues of withheld evidence and thus can be analyzed in terms of *Bagley*," Respondent's Brief at 9, is flat wrong. As it did at trial, the state ignores the perjured testimony and the evidence creating a false impression.

The state's attempts to minimize Smallwood's false testimony and Det. Dillman's pretrial mischaracterization of the witnesses' statements are unpersuasive. Especially unpersuasive is the state's conclusory denial of any false evidence, followed by the unsubstantiated assertion that "[t]he record simply does not support Kyles's charges." Respondent's Brief 23.

The proof *is* in the record. Isaac Smallwood pointed to Kyles at trial and said "that's the man who I seen kill that woman". Tr 387.[2] He saw no such thing, and the prosecutors knew it.

The state no longer disputes, because it cannot, that it was Beanie who first suggested that the police search

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[2] All citations to the record correspond to Petitioner's Brief 2, n.1.

Kyles's garbage, JA 257.[3] Respondent's Brief 29-30. Yet the state denied that fact at a pretrial hearing. R vol II 47. At another pretrial hearing, the state's witness testified there were no discrepancies among the various witness accounts of the murder, again falsely. R vol I 117-8. This is yet another instance of false testimony fully supported by the record.

The state pretends that the only value of the Strider interview with Beanie is the fact that it contradicted other statements of Beanie. Respondent's Brief 34-35.[4] But it was in this interview that Beanie confirmed he visited Kyles's home the Sunday before the gun was discovered, as Burnes, Kyles, Brown and Campbell all testified. JA 262. Det. Dillman testified that he had "no idea" if Beanie was at Kyles's house on Sunday. Tr 93. The jury was given a false impression about a material matter: whether or not Beanie was in a position to plant the gun found at Kyles's home. *See* Petitioner's Brief 42, n.43.

At the postconviction hearing, Det. Dillman admitted that his testimony at trial – that Beanie was reimbursed $400 for the purchase of the car – was false, and testified

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[3] Prosecutor Strider admitted in the postconviction proceedings that Beanie's suggestion to the police to search Kyles's garbage was *Brady* material. H 2/20 148.

[4] Significantly, the state fails to point out that prosecutor Strider testified in postconviction that Beanie's inconsistencies *would have been* detrimental to the state, *would have been* beneficial to the defense, and, thus, *should have been* disclosed. H 2/20 134.

that Beanie had in fact been paid $600. H 2/24 19-20.[5] The distinction is not trivial: the true amount paid Beanie represents an informant's reward, not the mere recovery of the automobile's $400 purchase price. This is yet another instance of false testimony fully supported by the record.

B. The State Fails To Recognize The Inherent Impeachment Value Of The Witnesses' Statements

The state's reliance on the "four eyewitnesses" who testified at Kyles's trial is misplaced. The state quite simply fails to address the heart of Kyles's argument, that the withheld statements would have severely impeached the eyewitnesses. The state fails to recognize the impeachment value to the defense of the withheld initial statements.[6]

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[5] In its brief, the state claims, "Det. Miller checked the records during postconviction proceedings and determined that police had paid Beanie a total of $600.00, and this fact was reported to the court." Respondent's Brief 29. There is absolutely no evidence that any records were "checked" and certainly there is no evidence of such a payoff in the police files discovered after the trial.

Further, the state claims, "The State did not even claim that Beanie was an innocent purchaser of Mrs. Dye's vehicle. . . . " Respondent 24. This point is belied by Dillman's testimony at trial wherein he states that Beanie was "reimbursed" $400 for the car. Tr 94-95.

[6] One of the eyewitnesses was perhaps not called to the stand by the state because what he observed was very different from the witnesses it did call. According to Edward Williams, "They went around the car about three times . . . she struggled

One of the "four eyewitnesses" is Darlene (Cahill) Kersh; the state notes in a footnote that she recanted her testimony, and misleadingly asserts that "[Kersh] now claims she could not identify the perpetrator." Respondent's Brief 13, n. 9. The state cannot brush aside this recantation so easily. Kersh's affidavit makes clear that she could not identify the perpetrator and she so informed the state, yet the prosecution implored her to lie. RA 22-41. The thrust of Kersh's postconviction affidavit is that there was serious state misconduct.

The state suggests that since the witnesses, other than Smallwood, did not testify to matters different from their original statements, the discrepant descriptions of the perpetrator given at the scene of the crime were not favorable to the defense. The state refuses to address or even acknowledge the obvious: discrepancies *among* the witnesses original descriptions are highly valuable to competent counsel. Trial counsel would have been able to compare for the jury's edification the variant descriptions, and so illustrated that even sincere witnesses may not observe as well as they would like to in moments of sudden shock and violence.

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and began to beat him with the keys like in the face and chest area . . . she was using the keys as a weapon . . . she jugged him 6-12 times." *Dye v. Schwegmann Giant Super Markets*, 599 So.2d 412, 417 (La. Ct. App. 1992).

C. The State Fails To Meet The Remainder Of Petitioner's *Brady* Argument

The state of Louisiana put Curtis Kyles on trial for his life without revealing that it possessed evidence supporting his defense. The state knew, but did not disclose, that the physical evidence against Kyles was obtained only after Beanie told the police where to look[7] and only after Beanie had the time and opportunity to plant the evidence himself.[8] The state knew, but withheld from the defense, the fact that Beanie had what any defense lawyer could have argued was "guilty knowledge" and what any juror might have seen as a motive for framing Kyles. He had the victim's car, he changed the plate on that car, he knew on which side of the Schwegmann lot Mrs. Dye was killed, he knew he had been seen driving the car, and he told the police he was afraid he would get in trouble over the killing.

The defense requested, but the state failed to provide, the witnesses' statements taken at the time of the murder which would have impeached the state's witnesses and shown the capriciousness of the eyewitnesses' identifications. The state knew but failed to reveal that

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[7] "If you set him up good, you can get that same gun," Beanie tells the police officer, who replies "You'd help me?" JA 229. Later the same night Beanie says that "if he's smart" Kyles will put the purse in the garbage. JA 257.

[8] Beanie told Prosecutor Strider that he was at Kyles's apartment twice on Sunday, September 24th. JA 263. Burnes testified he saw Beanie stooping near the stove that night. Tr 263. The garbage, with Mrs. Dye's purse, was retrieved by the police in the early morning on Monday, the 25th, and the gun was found later that same day. Tr 65-75.

Beanie corroborated statements made by key defense witnesses, particularly Johnnie Burnes's claim that Beanie was present at the Sunday dinner and that Beanie changed the license plate. The state knew, but failed to disclose, that a police check of the license plates of cars in the Schwegmann lot did not include Kyles's car. This evidence must be analyzed in light of the state exploiting a blurry enlarged photograph of some of the cars in the parking lot and then arguing to the jury that Kyles's car is visible.[9] The state knew, but did not reveal, that Beanie changed his account of how and when the victim's car was allegedly sold and who was present when the groceries were supposedly unloaded, that Beanie had been arrested at the scene of the murder only a few months earlier, that Beanie had robbed another woman in her home and was at least present when she was shot and killed with his gun. D-9.

The state acknowledges, because it must, that considerable evidence relating to Beanie was withheld from Kyles's trial counsel. The state repeats the lower court's observation that Beanie was not a witness and so his credibility was not at issue, without acknowledging that

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[9] The state responds in its brief that "the United States District Court and the Fifth Circuit below concluded that the list was not complete." Respondent's Brief 31-2. There is no evidence for such a conclusion. In fact, Det. Miller testified post-conviction that he did not know if the list was complete, H 2/24 13. The issue is not whether the list was complete; the issue is, did the list include the car in the photograph that the state showed the jury? The prosecutor argued that the photograph was evidence supporting the state's theory that Kyles drove his own car to Schwegmann and left it there after the murder.

Kyles demonstrated that the withheld evidence concerning Beanie went to the credibility of the *state's case* and the quality of the investigation, not the credibility of a non-witness. Beanie "made the case," the prosecution boasted. Tr unnumbered vol 12/7/84 13. He not only gave the police Kyles's name[10], he told them where he lived, he suggested the search of the garbage that produced the victim's purse, he suggested the search of Kyles's apartment that turned up the murder weapon the day after Beanie went to that apartment, and he agreed to work with the police for a profit. The defense argued at both trials that Beanie framed Kyles and that he did so because he killed Mrs. Dye. In the light of these facts it is entirely irrelevant that Beanie's credibility as a witness was not an issue for the fact finder's determination.

The state seeks to minimize the evidence contained in the documents and on the tape the prosecution secreted by suggesting their value lay only in the internal contradictions. While it is true that Beanie cannot tell the story the same way twice,[11] there is much in the withheld material beyond mere inconsistency. The credibility of the defense witnesses was very much at issue in this trial. Burnes, Campbell, Brown and Kyles himself testified that Beanie was at the Sunday dinner, and had an opportunity to plant the gun which was found there the next day. Tr 263, 291-318. The state's witness, Dillman, testified that he "had no idea" whether or not Beanie was present at

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[10] The district court's finding, relied upon by the state, Respondent's Brief 24, n.25, that Beanie merely supplied the police with a name is contrary to the record. JA 221-257.

[11] *See* Petitioner's Brief at 27, n.26.

the dinner. Tr 93. Beanie himself told prosecutor Strider that he had been at Kyles's apartment twice on the day before Kyles was arrested. JA 262. Thus the withheld evidence would have strongly corroborated critical defense witnesses.

Johnnie Burnes also testified that he saw Beanie change the license plate on Mrs. Dye's stolen car. Tr 260. Again, Det. Dillman professed ignorance of this important fact to the jury. Tr 95. But Beanie admitted to the prosecutor that he had done so. JA 261. His admission fit the defense theory perfectly: Beanie changed the plate because Beanie knew the car was stolen in a murderous robbery, and Beanie had to come up with a scheme to put the blame on someone else. The prosecutor permitted the jury to believe there was a question of fact over who changed the license plate when he knew that Beanie had done it. Again, the evidence withheld by the state would have provided crucial corroboration of an important defense witness.

Kevin Black testified for the defense that Beanie was driving the victim's car on September 20th, the day the murder occurred; he said that Beanie's hair was in plaits. Tr 208. His testimony was perfectly consonant with Ronald Gorman's, who said Beanie tried to sell him the car on that Thursday, and that Beanie's hair was in plaits. Tr 234-35. Black was already "visibly shaken" after the prosecutor told him that he could be facing a charge of "accessory after the fact to first degree murder." H 2/20 33; Tr 198. Absent from the Respondent's Brief is the fact that the prosecutor admitted in the postconviction hearing that there was *no* reason to believe Black and Gorman were involved in the murder. H 3/1 18.

Following Black's direct examination, the prosecutor launched into an attack and accused Black of committing perjury. Tr 216-17. Black denied every allegation regarding any involvement in the murder. Tr 218. Every single element of the story that the prosecutor narrated for the jury's benefit and to the detriment of Black's credibility came from the mouth of Beanie. The only person to allege that Black was in any way involved in the transfer of groceries from the victim's car was Beanie; the only person to hear that story pretrial was Cliff Strider, the prosecutor. JA 258-60.

The vicious attack on Black's credibility, coming after the admittedly unjustified and devastating threat to prosecute him as an accessory to capital murder, worked very much to Kyles's detriment. The state cannot tenably argue that the withheld materials were relevant only to Beanie's credibility when the materials clearly would have corroborated defense witness testimony and when they were the only source of the attack on a critical defense witness.

D. In Louisiana Residual Doubt Is An Appropriate Consideration When Assessing Error At The Penalty Phase

The state claims that the lower court was correct in not considering the effect the suppressed evidence would have had at the sentencing phase on the issue of residual doubt when performing the materiality test for either the

presentation of false evidence[12] or the suppression of favorable evidence.

The state offers sophistry to meet Kyles's argument. The state argues that any residual doubt at the penalty phase is actually an "unreasonable" doubt since the jury found guilt beyond a reasonable doubt. Respondent's Brief 38. In Louisiana, residual doubt is a relevant and appropriate issue for the jury to consider when deciding penalty. *State v. Lee*, 524 So.2d 1176 (La. 1987) (on rehearing). An "uncertainty, though not rising to the level of reasonable doubt," can and does under Louisiana law inure to a defendant's benefit. *Id.* 1192. The state offers no authority to the contrary.[13]

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[12] The lower court failed to analyze the state's presentation of Smallwood's testimony under the harmless error test announced in *Napue v. Illinois, supra*, and upheld in *United States v. Bagley*, 473 U.S. 667 (1985). *See* Petitioner's Brief 46.

[13] The state cites an unpublished appendix in a direct appeal decision in which the appellant unsuccessfully challenged the holding of *Franklin v. Lynaugh*, 487 U.S. 164 (1988). Respondent's Brief 38.

CONCLUSION

For the above reasons, and for the reasons advanced in Petitioner's Brief, this Court should reverse the decision of the Court of Appeals.

Respectfully submitted,

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